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NO. _____

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1985

S. DON HUCKABY,
*Petitioner*

v.

UNITED STATES OF AMERICA AND
EDMOND J. MARTIN,
*Respondents*

**On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I

## QUESTIONS PRESENTED

1. Does the Fifth Circuit reduce a summons enforcement proceeding to a meaningless ritual by requiring a summonee to defend against the summons as though he were defending against a contempt citation?

2. Does the Fifth Circuit's avoidance of the issue of an individual's right against self-incrimination at a summons enforcement proceeding unconstitutionally compel the individual to be a witness against himself?[1]

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1. The parties to this proceeding are United States of America, Internal Revenue Service Special Agent Edmond J. Martin, and S. Don Huckaby.

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**On Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit**

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on November 18, 1985, and its judgment denying rehearing entered December 31, 1985.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit, reported at 776 F.2d 564, appears in the appendix, page A-1. The judgment of the Court of Appeals denying rehearing appears in the appendix, page A-20. The memorandum final judgment of the United States District Court for the Southern District of Texas, not reported, appears in the appendix, page A-16.

## JURISDICTION

The judgment of the United States Court of Appeals for the Fifth Circuit sought to be reviewed was rendered and entered on November 18, 1985. The judgment denying rehearing was rendered and entered on December 31, 1985. Jurisdiction to review the judgment in question by writ of certiorari is conferred on this Court by 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Amendment V (self-incrimination) See appendix at A-22. Internal Revenue Code of 1954, as amended, sections:

| | |
|---|---|
| 7210 | See Appendix at A-22. |
| 7402(b) | See Appendix at A-22. |
| 7602(a) | See Appendix at A-23. |
| 7604(a) | See Appendix at A-24. |
| 7604(b) | See Appendix at A-24. |

## STATEMENT OF THE CASE

Edmond J. Martin, formerly holding the office of special agent of the Internal Revenue Service but no longer with the Internal Revenue Service, served an In-

ternal Revenue Service summons on S. Don Huckaby as president of Good Times Liquor, Inc., for Huckaby to produce a certain corporate ledger. Huckaby informed Special Agent Martin that he did not have the records and that he claimed his right against self-incrimination to all further questions. The United States and Special Agent Martin then filed an action under I.R.C. §§ 7604(a) and 7402(b) seeking enforcement of the summons requiring Huckaby to produce and to give testimony concerning the records sought. The government attached to its pleading a declaration of Special Agent Martin asserting that the minimal criteria announced by this Court in *United States v. Powell,* 379 U.S. 48, 57-58 (1964), had been met: that the investigation from which the summons issued is being conducted pursuant to a legitimate purpose; that the information sought in the summons is relevant to the investigation and not already in the government's possession; and that all administrative steps required by the Code in issuing the summons have been followed. The government presented no evidence at the hearing that Huckaby actually possessed or controlled the summoned records. Huckaby testified at the hearing that he did not possess or control the records but refused to answer any questions concerning the contents or present whereabouts of the records on the ground that such questions might tend to incriminate him. To counter Huckaby's testimony, the government called two witnesses on rebuttal, a former employee of the corporation and the new owner of the corporation. Neither witness presented any testimony or evidence that Huckaby possessed or controlled the records or that the records still existed.

The district court incorrectly held that Huckaby waived his right against self-incrimination to further questioning

once he had testified that he did not possess or control the records. Based on that incorrect ruling, the district court struck Huckaby's initial testimony and decided that Huckaby actually possessed and controlled the records despite the lack of any evidence to support such a holding. The district court then ordered the summons enforced only *duces tecum*, not *ad testificandem*. Appendix, page A-19.

The United States Court of Appeals for the Fifth Circuit affirmed enforcement of the summons on the ground that Huckaby's testimony that he did not possess or control the records was not "credible" since Huckaby claimed his right against self-incrimination to cross-examination on that statement. 776 F.2d at 568, appendix, page A-12. The Fifth Circuit reasoned that Huckaby therefore had failed to carry his burden of producing relevant and reliable evidence that he did not possess or control the records. 776 F.2d at 568-69, appendix, page A-12. The Fifth Circuit expressly refused to decide whether Huckaby had truly waived his right against self-incrimination (776 F.2d at 570, appendix, page A-14) and, for that matter, whether the right was even available for Huckaby to claim (*Id.*, n. 7). The Fifth Circuit felt that its decision was mandated by the "reasoning, although not [the] holding," of this Court in *United States v. Rylander*, 460 U.S. 752 (1983). 776 F.2d at 568, appendix, page A-11. *Rylander* involved an appeal from an order in a civil contempt hearing brought to punish a witness for failing to obey a summons enforcement order. That decision turned on the fact that a summonee at a contempt hearing is not free to relitigate the question of his lack of possession or control of records that he failed to contest at the prior summons enforcement proceeding. *Rylander*, 460 at 756. The Fifth Circuit's opinion takes for granted

that the restrictions applicable to a contempt hearing can be foisted upon the fundamentally different summons enforcement proceeding which is designed to determine in the first instance whether the summonee possesses or controls the summoned records. The Fifth Circuit's opinion is an unprecedented extension of *Rylander* that conflicts not only with the Second Circuit's opinion in *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313 (2nd Cir. 1979), but also with language in *Rylander* itself.

## REASONS FOR GRANTING THE WRIT

### I. The Fifth Circuit's opinion conflicts with the Second Circuit's opinion in *United States v. O'Henry's Film Works, Inc.*

In *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313 (2nd Cir. 1979), the Internal Revenue Service summoned Henry Pergament as president of O'Henry's Film Works, Inc. to produce and to give testimony about certain corporate documents. No records were produced, and Pergament appeared in response to the summons refusing to answer substantive questions on the ground of his right against self-incrimination. Thereafter, the United States and Internal Revenue Service Special Agent Joseph McGrath filed an action pursuant to I.R.C. §§ 7402 and 7604 seeking enforcement of the summons, just as in the instant case. The special agent even included in his declaration attached to the pleadings the facts that led him to believe that the corporate records still existed. 598 F.2d at 315. At the summons enforcement proceeding, Pergament filed a sworn affidavit stating that he was not then or at the time summoned in possession or control

of the summoned records and that he refused to answer any further questions concerning the records on the ground of his right against self-incrimination. The content of Pergament's affidavit (598 F.2d at 315-16) is the same as Huckaby's oral testimony before the district court, quoted in the Fifth Circuit's opinion (776 F.2d at 566, appendix, pages A-4-6). The district court in *O'Henry* found that the Internal Revenue Service had not adequately established the existence of the records and denied enforcement of the summons requiring production of the records. However, the district court held that Pergament had waived his right against self-incrimination by the filing of his affidavit and ordered Pergament to respond to questions concerning the whereabouts of the records. 598 F.2d at 316.

The Second Circuit in *O'Henry* reversed the district court's order requiring Pergament to testify regarding the whereabouts of the records. Relying heavily upon *Curcio v. United States,* 354 U.S. 118 (1957), and *McPhaul v. United States,* 364 U.S. 372 (1960), the Second Circuit found that Pergament had not waived his right against self-incrimination by the filing of his affidavit. The Second Circuit found that Pergament was compelled under the circumstances to either produce the records or to give sworn testimony that he did not possess the records. 598 F.2d at 318.

In the instant case, the district court held that Huckaby had waived his right against self-incrimination by initially testifying that he did not possess or control the records. The district court then struck Huckaby's initial testimony and held that Huckaby actually possessed the records (appendix, page A-17) despite the lack of *any* evidence before the court to that effect and despite the government's

inability to present any such proof on rebuttal. The district court then, curiously, enforced the summons only *duces tecum* as was done in *Rylander*.

The Fifth Circuit could see no significant difference between Huckaby's position at the summons enforcement proceeding below and Rylander's position at a contempt hearing. The Fifth Circuit stated that "Rylander and Huckaby each had a burden of production, although for different reasons." 776 F.2d at 569, appendix, page A-12. The Fifth Circuit nowhere considered that the relative burdens of production might be different. Rylander's burden was to produce documents found to be in his possession by a prior court, whose order he did not contest or appeal from. Huckaby's burden was to produce evidence at an enforcement proceeding for the judge to initially determine whether the government's summons was enforceable. The Fifth Circuit then stated that "[t]he question of whether Huckaby waived his fifth amendment right by taking the stand at the summons enforcement proceeding need not be decided because our affirmance of the enforcement of the summons is based not on waiver, but simply on a failure to meet a burden of production." 776 F.2d at 570, appendix, pages A-14-15. In *Rylander*, this Court placed such a burden on an individual at a contempt hearing because the individual could not relitigate the issue of his possession or control of the records. 460 U.S. at 757. Huckaby should not have to bear the same burden because he was served with an Internal Revenue Service summons and because the government filed a minimal *Powell* declaration at an enforcement proceeding, especially where the government was totally unable to present any evidence that Huckaby actually possessed or controlled the records.

The Fifth Circuit's treatment of the case conflicts with the Second Circuit's opinion in *O'Henry* in an identical context. The Fifth Circuit's opinion turns a summons enforcement proceeding into a contempt hearing by placing the same burden of production on Huckaby as was placed on Rylander simply because Huckaby was issued a summons. The Fifth Circuit's opinion also destroys all opportunity for a summonee ever to successfully raise a fifth amendment objection to a summons. This result conflicts with several statements by this Court that the summons enforcement proceeding is precisely the place for such a claim to be raised and determined.

## II. The Fifth Circuit's decision, by improperly applying the standard for the burden of production at a contempt hearing to a summons enforcement hearing, reduces the summons enforcement proceeding from an adversary proceeding to a meaningless ritual.

### A. The Internal Revenue Code provisions governing summonses authorize the institution of summons enforcement proceedings, among other measures, for the Internal Revenue Service to obtain compliance with its summonses.

I.R.C. § 7602(a) authorizes the Internal Revenue Service to summon any person to produce books and records and to give testimony that may be relevant to ascertaining the correctness of any return or to determine the tax liability of any person. Two nearly identical provisions of the Code, §§ 7402(b) and 7604(a), give jurisdiction to the district court to compel compliance with

any Internal Revenue Service summons. The Code also contains a provision permitting the Internal Revenue Service to apply to the district court for an attachment against a summonee "as for a contempt" should the summonee neglect or refuse to obey a summons. I.R.C. § 7604(b). This Court, however, as discussed more fully below, has limited the use of the latter remedy to cases in which the summonee wholly makes default or contumaciously refuses to comply with a summons. *Reisman v. Caplin,* 375 U.S. 440, 447-49 (1964). Finally, the Code also contains a criminal provision for failure to obey a summons, § 7210, carrying a possible sentence of a $1,000.00 fine and imprisonment of one year. The summons enforcement proceeding of §§ 7402(b) and 7604(a) is the proceeding instituted by the Internal Revenue Service below to obtain compliance with its summons to Huckaby.

**B. This Court has consistently viewed the summons enforcement proceeding as the action designed for testing all defenses and constitutional claims made against an Internal Revenue Service summons.**

This Court first reviewed the provisions of the Internal Revenue Code regarding summonses in *Reisman v. Caplin,* 375 U.S. 440 (1964). Reisman and several fellow attorneys, representing a husband and wife, filed an action in their own names seeking an injunction and declaratory relief against both the Internal Revenue Service and a public accounting firm. The attorneys sought to prevent compliance with an Internal Revenue Service summons directing the accounting firm, which the attorneys had hired to assist them in the couple's tax proceedings, to

produce all records in its possession pertaining to the husband taxpayer and his businesses. The attorneys claimed that compliance with the summons would be an unlawful appropriation of their work product and would deprive the taxpayers of their rights against self-incrimination and to effective assistance of counsel. The attorneys urged also that the penalties of contempt under § 7604 (b) risked by a refusal to comply with the summons were so severe that the statutory procedures of the Code amounted to a denial of judicial review. This Court granted certiorari and affirmed dismissal of the attorneys' action, holding that there exists an adequate remedy at law to contest the summons in the "comprehensive procedures of the Code" concerning summonses. 375 U.S. at 450.

The adequate remedy at law, the Court found, exists in the taxpayer's or other interested party's right to "challenge the summons on any appropriate ground" (375 U.S. at 445) in any judicial proceeding initiated by the government to obtain compliance with its summonses. The Court noted that § 7604(b), permitting the Commissioner to apply for an attachment "as for a contempt" against any summonee who neglects or refuses to obey a summons, is a remedy intended to cover only summonees who wholly made default or who contumaciously refused to comply with a summons. The Court immediately recognized the constitutional implications of holding a summonee in contempt for claiming a privilege in response to a summons:

> It is true that the attachment procedure of § 7604(b) has been occasionally used even where the person summoned refused to testify because of a claimed privilege. *E.g., Sale v. United States,* 228 F.2d 682,

> and *Brownson v. United States*, 32 F.2d 844. We believe that the use of § 7604(b) in that context is inappropriate. Attachment of a witness who has neither defaulted nor contumaciously refused to comply would raise constitutional considerations, which need not be considered at this time under our reading of the statute. 375 U.S. at 448, n. 8.

This Court also specifically approved of the summonee and other interested parties appearing before the Internal Revenue Service agent issuing the summons and before the district court in one of the later proceedings brought by the government and "[challeng]ing the summons by asserting their constitutional or other claims." 375 U.S. at 445. When addressing the summons enforcement procedure of § 7402(b), the Court specifically stated:

> Any enforcement action under this section would be an adversary proceeding affording a judicial determination of the challenges to the summons and giving complete protection to the witness. In such a proceeding only a refusal to comply with an order of the district judge subjects the witness to contempt proceedings. 375 U.S. at 446.

In the instant case, Huckaby did not contumaciously refuse to obey or wholly default on the summons served on him. With assistance of counsel, Huckaby informed the special agent issuing the summons of his lack of possession and control of the records and claimed his fifth amendment right to further questioning. The government did not thereafter seek an attachment against Huckaby as for a contempt (I.R.C. § 7604(b)) nor did it seek any criminal sanctions against Huckaby (I.R.C. § 7210). The government brought an adversary enforcement action against Huckaby for a judicial deter-

mination of Huckaby's challenges to the summons. The Fifth Circuit did not give Huckaby "complete protection" for the timely claiming of his right against self-incrimination at the enforcement hearing. *Reisman,* 375 U.S. at 446. The court avoided the issue of Huckaby's fifth amendment claim by holding that his testimony was not "credible"—precisely because he claimed his right when questioned on the whereabouts and contents of the records. 776 F.2d at 569, appendix, page A-12. The Fifth Circuit's opinion positions Huckaby for a contempt citation just as effectively and inappropriately as if the government had sought an attachment against Huckaby under § 7604(b) for claiming his constitutional right. The effect of the Fifth Circuit's ruling is to eliminate any consideration of Huckaby's defense to the summons as punishment for his claiming his right.

In the term after *Reisman v. Caplin* was decided, this Court granted certiorari in *United States v. Powell,* 379 U.S. 48 (1964), to clarify the standards that the Internal Revenue Service must meet to obtain enforcement of its summonses at a summons enforcement proceeding brought pursuant to I.R.C. §§ 7604(a) and 7402(b). The criteria are that the Commissioner must show that the investigation is being conducted pursuant to a legitimate purpose, that the information sought is relevant to the investigation and not already in the Commissioner's possession, and that all administrative steps required by the Code have been followed. 379 U.S. at 57-58. The Court added that the Commissioner's above showing does not make "meaningless" the adversary hearing to which the taxpayer is entitled before enforcement is ordered. *Powell* at 58. The lower court cases after *Powell,* including those in the Fifth Circuit, have held that the government's initial

burden of proving the *Powell* criteria is a "slight one" (*see, e.g., United States v. Texas Heart Institute,* 755 F.2d 469, 474 (5th Cir. 1985); *United States v. Kis,* 658 F.2d 526, 536 (7th Cir. 1981), *cert. denied sub nom. Salkin v. United States,* 455 U.S. 1018 (1982); *United States v. Garden State Nat'l Bank,* 607 F.2d 61, 70 (3rd Cir. 1979)) and have permitted the government to make its initial showing by an affidavit of the Internal Revenue Service agent issuing the summons, as was done in the instant case, merely asserting compliance with the *Powell* criteria. *See, e.g., Kis,* 658 F.2d at 536; *United States v. Davis,* 636 F.2d 1028, 1034 (5th Cir. 1981), *cert. denied* 454 U.S. 862 (1981). After the government's initial showing by affidavit, the burden shifts to the summonee to disprove one of the *Powell* criteria or to otherwise show why the summons should not be enforced. *United States v. LaSalle Nat'l Bank,* 437 U.S. 298, 316 (1978); *Powell* at 58. This Court in *LaSalle* termed the burden on those opposing enforcement of a summons a "heavy one." *LaSalle* at 316.

*Powell* reaffirms this Court's view of the summons enforcement proceeding as an adversarial hearing to contest a summons prior to any thought of punishing the taxpayer for disobedience to the summons. In *McPhaul v. United States,* 364 U.S. 372 (1960), this Court examined the duty of one unable to comply with a document subpoena. The U.S. House of Representatives had subpoenaed McPhaul "to produce certain records of the Civil Rights Congress before a Subcommittee of the House on Un-American Activities." 364 U.S. at 373. McPhaul refused to answer any questions dealing with the subpoenaed books and records, including whether the books and records existed and whether they were in his

possession or control. This Court affirmed McPhaul's contempt conviction for failure to respond to the subpoena. This Court stated that if McPhaul " 'had legitimate reasons for failing to produce the records . . . , a decent respect for the House of Representatives . . . would have required that [he] state [his] reasons for noncompliance.' " 364 U.S. at 379 (quoting *United States v. Bryan,* 339 U.S. 323, 332 (1950)). Such a statement, this Court held, "would have given the Subcommittee an opportunity to avoid the blocking of its inquiry by taking other appropriate steps to obtain the records." 364 U.S. at 379. This Court also stated that "[t]o deny the Committee the opportunity to consider the objection or remedy it is in itself a contempt of its authority and an obstruction of its processes." 364 U.S. at 379 (quoting *Bevan v. Krieger,* 289 U.S. 459, 464-65 (1933)). This Court termed McPhaul's failure to make any such statement a " 'patent evasion of the duty of one summoned to produce papers.' " 364 U.S. at 379 (quoting *United States v. Bryan,* 339 U.S. at 333).

The Fifth Circuit below errs in holding that the burden shifted to Huckaby after the government's initial showing of the *Powell* criteria is a burden equivalent to that at a contempt hearing as in *Rylander.* Such a holding, in *Powell's* words, would make the summons enforcement proceeding "meaningless." At the summons enforcement proceeding below, Huckaby showed respect for the document summons issued him by stating his reasons for noncompliance, namely his lack of possession and control of the records. The government tried to rebut Huckaby's defense but failed to present any evidence that the records existed or that they were in Huckaby's possession or control. The United States and Special Agent Martin, the

parties instituting the enforcement action below, failed to sustain their ultimate burden of proving that the summons should be enforced. The Second Circuit in *O'Henry* properly extended the doctrine of *McPhaul* to the setting of a summons enforcement proceeding; the Fifth Circuit was incorrect in not doing the same below. Nothing in this Court's opinion in *Rylander* requires reversal of the principles of this Court quoted in *McPhaul* at summons enforcement proceedings.

### C. The doctrine in *United States v. Rylander* is inapplicable to the summons enforcement procedure.

In *United States v. Rylander*, 460 U.S. 752 (1983), taxpayer Richard Rylander completely ignored an Internal Revenue Service document summons served on him. The government sought to enforce the summons pursuant to § 7402(b), although arguably the situation could have justified an attachment proceeding under § 7604(b) for Rylander's default and contumacious refusal to comply with the summons. Rylander for several months evaded service of the district court's order for him to show cause why the summons should not be enforced. Rylander did not appear at the summons enforcement hearing, nor did he seek reconsideration of or appeal from the court's order to enforce the summons. At a later contempt hearing, brought to punish Rylander for disobeying the district court's order, Rylander attempted to raise the defense that he did not possess the records and claimed his right against self-incrimination to further questioning.

The Supreme Court reversed the Ninth Circuit and upheld the district court's order holding Rylander in con-

tempt. The Court held that the Ninth Circuit was incorrect in its view of the relationship between the summons enforcement proceeding and the contempt proceeding and in its view of the effect of Rylander's invocation of his fifth amendment right on the "burden of production" at the latter hearing. *Rylander,* 460 U.S. at 755-58. This Court held that because the summons enforcement hearing is an adversary proceeding in which the defendant may contest the summons "on any appropriate ground" (*Rylander,* 460 U.S. at 757, quoting *Reisman v. Caplin,* 375 U.S. at 449), the defense of lack of possession or control of the records may not be raised for the first time in a contempt proceeding. The Court quoted its earlier opinion in *Maggio v. Zeitz,* 333 U.S. 56, 69 (1948), that "a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus [does not] become a retrial of the original controversy." *Rylander,* 460 U.S. at 756. The Court stated that a defendant in a civil contempt proceeding may raise a defense of *present* inability to comply with the enforcement order, but that in raising such a defense the defendant has a "burden of production." *Rylander,* 460 U.S. at 757. This Court held that Rylander's assertion of his fifth amendment right at the contempt proceeding was not a substitute for evidence in meeting Rylander's burden of production. The Court upheld the district court's striking of Rylander's uncross-examined testimony and the district court's conclusion that Rylander consequently had failed to introduce any evidence at the contempt proceeding. *Rylander* holds, much in line with the statutory procedures of the Code and with this Court's prior discussions in *Reisman v. Caplin* and *Powell,* that the summons enforcement proceeding is the vehicle

designed to weigh defenses such as lack of possession or control of records and to scrutinize the propriety of a summonee's claim of his right against self-incrimination. *Rylander* teaches that Huckaby must present his defense and his fifth amendment claim at the summons enforcement proceeding because neither is open for relitigation at a later contempt hearing. The Fifth Circuit totally confuses the purposes of the two hearings and their relationship to each other, upsetting the carefully-considered provisions of the Internal Revenue Code and violating this Court's prohibition in *Reisman* against punishing a summonee for properly claiming his right against self-incrimination.

## III. The Fifth Circuit's failure to reach the issue of an individual's claim of his right against self-incrimination at a summons enforcement proceeding to questions concerning the whereabouts of summoned records unconstitutionally compels the individual to be a witness against himself.

### A. This Court has stated that a right against self-incrimination can be claimed, under the proper circumstances, at a summons enforcement proceeding.

In *Fisher v. United States* and its companion case of *United States v. Kasmir*, 425 U.S. 391 (1975), the Internal Revenue Service issued a document summons compelling a taxpayer's attorney to produce workpapers that the taxpayer's accountant had prepared and which were in the possession of the attorney when summoned. The two cases arose in the Third and Fifth Circuits, respectively, and differed over whether a taxpayer's right

against self-incrimination could bar production of unprotected records that were known to exist. This Court granted certiorari to resolve the conflict between the Circuits and squarely decided that the right against self-incrimination is applicable to the *act of producing* documents:

> The act of producing evidence in response to a subpoena nevertheless has communicative aspects of its own, wholly aside from the contents of the papers produced. . . . The elements of compulsion are clearly present, but the more difficult issues are whether the tacit averments of the taxpayer are both "testimonial" and "incriminating" for purposes of applying the Fifth Amendment. 425 U.S. at 410.

The Court went on to find that the act of producing the documents did not rise to the level of a "testimonial" communication because the "existence and location of the papers" were foregone conclusions and because the taxpayer "add[ed] little or nothing to the sum total of the government's knowledge" by conceding that he had the papers. 425 U.S. at 411. The Court also found that the existence of the papers and their possession by the taxpayer did not pose "any realistic threat of incrimination to the taxpayer." 425 U.S. at 412. This Court later in *United States v. Doe*, 465 U.S. 605, 611 (1984), quoted *Fisher* in barring production of records where the *act of production* would incriminate the individual custodian of the records even though the custodian's right against self-incrimination did not protect the *contents* of the records.

Just as the acts of production in *Fisher* and *Doe*, Huckaby's act of nonproduction has communicative aspects all its own. The "difficult issue" that the Fifth Circuit should have addressed is whether Huckaby's oral testimony re-

garding the whereabouts and contents of the unprotected records is compelled, testimonial, and incriminating. The result of the Fifth Circuit's avoidance of the issue is that Huckaby must prove a negative—that he does not possess or control the summoned records—or face a contempt citation. The only possible proof is his own testimony, but testifying subjects him to the "cruel trilemma of self-accusation, perjury, or contempt" in violation of his right against self-incrimination. *Couch v. United States*, 409 U.S. 322, 328 (quoting *Murphy v. Waterfront Commission of New York*, 378 U.S. 52, 55 (1964)).

### B. This Court has held that an individual cannot be compelled to testify to the whereabouts of subpoenaed records after he testifies that he does not possess or control the records.

In *Curcio v. United States*, 354 U.S. 118 (1957), a grand jury subpoenaed Curcio as secretary-treasurer of a local Teamster's union to produce the union's books and records. Curcio testified that "the union had books and records but that they were not then in his possession." 354 U.S. at 119. Curcio claimed his right against self-incrimination to questions concerning the whereabouts of the records. This Court unanimously reversed a contempt citation against Curcio adjudged by the district court and affirmed by the Second Circuit. This Court reviewed the case law holding that a custodian of unprotected records waives his personal fifth amendment right with regard to the production of the unprotected records but held that questions regarding the whereabouts of the books and records went beyond being merely "auxiliary to the production." 354 U.S. at 125. This Court specifically held that "forcing the custodian to testify orally as

to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. He might be compelled to convict himself out of his own mouth. That is contrary to the spirit and letter of the Fifth Amendment." 354 U.S. at 128.

Three years later, this Court faced the other side of the question when an individual served with a document subpoena refused to make any statements whatsoever on fifth amendment grounds. *McPhaul v. United States,* 364 U.S. 372 (1960). This Court affirmed McPhaul's contempt citation precisely because McPhaul would not state his inability to comply with the document subpoena, denying the government an opportunity to rebut the defense. *Curcio* and *McPhaul* dictate the course of action that a summonee must follow. The Second Circuit correctly applied those principles in *O'Henry,* noting that the government, after the putative custodian's initial testimony, bore the burden of proving that the putative custodian possessed or controlled the records or that he destroyed the records. 598 F.2d at 318.

Huckaby, following the dictates of *Curcio* and *McPhaul,* informed the special agent of his lack of possession or control of the summoned records and claimed his fifth amendment right to further questioning. Had he failed to do so, he would have faced criminal or civil contempt sanctions. I.R.C. §§ 7210, 7604(b). Huckaby's only opportunity to litigate the propriety of his constitutional claim was at the ensuing enforcement hearing after the government had shifted the burden to him by making the minimal *Powell* showing. If to carry this burden he must incriminate himself or be held in contempt, the fifth amendment becomes meaningless. In view of this Court's rulings in *Curcio* and *McPhaul,* and their correct appli-

cation in *O'Henry,* this Court should grant certiorari in the instant case to preserve an individual's fifth amendment right against self-incrimination at a summons enforcement proceeding.

### C. The Fifth Circuit's opinion attempts to distinguish *Curcio* on untenable grounds.

The Fifth Circuit insists that it is not "forc[ing]" Huckaby to testify against himself by merely enforcing the summons. 776 F.2d at 569, appendix, page A-13. It quotes *Rylander* for the proposition that a possible failure of proof on an issue where the defendant had a burden of proof is not a form of "compulsion" requiring shifting of the burden of proof back to the government at the contempt hearing. 776 F.2d at 569, (quoting *Rylander,* 460 U.S. at 758), appendix, page A-13. The Fifth Circuit's reasoning incorrectly assumes that there exists extrinsic evidence that Huckaby could have introduced to prove the negative proposition the Fifth Circuit requires him to. The government's inability to produce any such extrinsic evidence on rebuttal demonstrates that the Fifth Circuit's assumption is incorrect; simple logic demonstrates that what the Fifth Circuit assumes is impossible. The Fifth Circuit never considers that it is truly forcing Huckaby to testify orally against himself in order to avoid being found in possession of records he does not have and being forever foreclosed at a later contempt hearing from relitigating the truth of his lack of possession and control of the records.

The Fifth Circuit makes much of the fact that it affirms enforcement of the summons only *duces tecum* and not *ad testificandem.* 776 F.2d at 570, appendix, page A-14. The Fifth Circuit can make such a distinction only be-

cause it has already replaced the normal evidentiary procedures of a summons enforcement proceeding with those of a contempt proceeding. Only at a contempt hearing can a defendant be subjected to the burden of production spoken of in *Rylander*, for there he has no means of relitigating the validity of the underlying court order he has disobeyed. At a summons enforcement proceeding where a defendant has met the government's initial *Powell* showing with his defense of lack of possession and control, the government and special agent, as plaintiffs, bear the ultimate burden of proving that their summons is enforceable. The district court must make proper determination of the enforceability of the summons while giving "complete protection" to the witness and to his constitutional claims. Indeed, no burden of production in the *Rylander* sense arises at the summons enforcement proceeding; such a burden of production can arise only in a later contempt proceeding. Furthermore, both *Fisher* and *Doe* demonstrate that the distinction at a summons enforcement proceeding between the *duces tecum* and the *ad testificandem* portions of a summons is not controlling. Both decisions state that mere acts of production, or the *duces tecum* part of a summons, can be barred in certain instances by an individual custodian's personal right against self-incrimination. The same reasoning should apply to testimony concerning the whereabouts of records the summonee cannot produce.

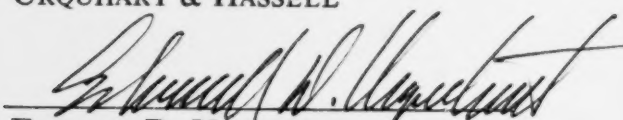
## CONCLUSION

This Court should grant certiorari to review the Fifth Circuit's opinion in the above case.

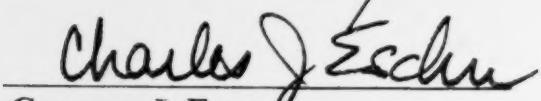
DATED: February 13, 1986

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-1774

OPINION

UNITED STATES OF AMERICA, ET AL.,
*Plaintiffs-Appellees,*

v.

S. DON HUCKABY,
*Defendant-Appellant.*

Filed November 18, 1985

Before: Randall, Davis and Hill, Circuit Judges.

Opinion by Judge Randall

Appeal from the United States District Court
for the Western District of Texas

Lucius D. Bunton, III, District Judge, Presiding

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SUMMARY

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Taxation/Courts and Procedures

Appeal from an order enforcing an Internal Revenue Service (IRS) summons. Affirmed.

Appellant was a shareholder in a liquor store in Texas from 1979 to 1982. In 1983 he became sole shareholder until he sold his assets later that year. As part of an investigation into the tax liabilities of the corporation and

appellant's partner, the IRS sought to examine a red accounts receivable book and documents from 1980, 1981 and 1982 tax years. An IRS agent served a summons on the appellant as company president requesting production of the documents, but he told the IRS he did not have the records and planned to claim his fifth amendment privilege to all further questions. The IRS petitioned for enforcement, and at a hearing the appellant raised the affirmative defense of nonpossession, but refused to answer other questions. The district court ruled that the summons be enforced to the extent it required production of documents. The court held that a party who takes the stand on his own behalf cannot claim the privilege against self-incrimination on cross-examination on matters reasonably related to his direct. The court therefore struck his testimony that he no longer had possession of the records and then found he had failed to carry his burden of production of credible evidence on the issue.

[1] Under *U.S. v. Powell,* 379 U.S. 48 (1964), in order for a district court to enforce an IRS summons, the government must produce evidence showing that the summons was issued for a proper purpose, the information sought is relevant to that purpose, the information sought is not already within the IRS Commissioner's possession, and all administrative steps required by the Internal Revenue Code have been followed. [2] Once the *Powell* factors have been met, the burden shifts to the parties resisting the summons to demonstrate that the IRS has failed to meet its *Powell* burden, to assert and prove that enforcement would represent an abuse of the court's process or show any other appropriate ground on which the summons should not be enforced. Lack of possession is a valid defense, but as with any defense, the party resist-

ing enforcement bears the burden of producing credible evidence that he does not control the documents. [3] Having concluded that the appellant had a burden of producing credible evidence of nonpossession, it is clear that he has not met his burden. [4] Since he declined to be cross-examined with respect to his assertions of nonpossession, the distict court was entirely justified in concluding that he failed to introduce any evidence at the contempt trial. [5] Appellant's reliance on *Curico v. U.S.*, 354 U.S. 118 (1957), is misplaced, in part because waiver was the focus of that case, while here the affirmance of the summons is based not on waiver, but simply on a failure to meet a burden of production.

## OPINION

RANDALL, Circuit Judge:

Sidney Don Huckaby appeals from an order of the United States District Court for the Western District of Texas enforcing an Internal Revenue Service summons issued against him as president of Good Times Liquor, Inc. The order requires production of an accounts receivable ledger for the 1980, 1981, and 1982 tax years. In the summons enforcement hearing, Huckaby asserted as a defense that he did not possess the requested document, but he declined to be cross-examined on the ground that his answers might tend to incriminate him and thus he was privileged not to testify under the fifth amendment. The District Court ordered the summons enforced, and we affirm.

## I.

Huckaby and Enzo "Jimmy" Pellegrino were shareholders in a liquor store and distributorship in Harker

Heights, Texas, called Good Time Liquor, Inc., from 1979 through 1982. In early 1983, Huckaby became the sole shareholder of the business, until he sold its assets later that year. As part of an investigation of the tax liabilities of Pellegrino and the corporation, Internal Revenue Service ("IRS") Special Agent Edward J. Martin sought to examine certain documents from the 1980, 1981, and 1982 tax years, including a red accounts receivable book. After it became clear that voluntary production was unlikely, Martin served a summons on Huckaby as company president requesting production of corporate records. Huckaby did not produce the documents, and told the IRS that he "did not have possession of the summoned corporate records and intended to claim his fifth amendment privilege to all further questions." The IRS petitioned to enforce the summons, and a hearing was held. Huckaby objected to enforcement of the summons and raised the affirmative defense of nonpossession.

On direct examination by his counsel, Huckaby testified as follows:

> Q. Okay. Mr. Huckaby, are you presently in posssession of, have the custody or control of the red ledger, that is being summonsed today by the Government?
>
> A. No.
>
> Q. When is the last time you had possession, custody or control of that item?
>
> A. Late January, early February.
>
> Q. Of 1983?
>
> A. Yes, sir.

Q. At that time did you know that you were under criminal investigation by the Internal Revenue Service?

A. Absolutely not.

Q. You had not been summonsed for those records either at that time?

A. No. Uh-uh.

Q. Did you have any idea that you would be under investigation or have those records summonsed from you?

A. No.

Q. Did your loss of possession, custody or control of those records have anything to do with anticipation of any criminal investigation by the Internal Revenue Service or of any summons?

A. No, sir.

MR. ESCHER: Your Honor, we tender the witness.

On cross-examination by counsel for the government, Huckaby refused to answer further questions concerning the whereabouts of the ledger:

BY. MR. PITZINGER:

Q. You have stated that you are not in possession of the red subsidiary accounts receivable ledger?

A. That is what I stated.

Q. Where are the records?

MR. ESCHER: Objection, Your Honor. Under the *Curseo* [sic] case we have also advised our

client to invoke the privilege against self-incrimination on that question as well.

BY MR. PITZINGER:

Q. Who did you give those records to?

MR. ESCHER: The same objection, Your Honor.

MR. PITZINGER: Your Honor, then I move to strike his earlier testimony that they are not in his possession and I have not had an opportunity to cross examine the witness upon whether or not they are in his possession.

THE COURT: Do you have anything else you need to question him about other than that particular thing?

MR. PITZINGER: No, Your Honor. That would be my last point.[1]

The District Court ruled in a written order that the summons be enforced to the extent that it required production of documents. On the fifth amendment issue, the court held that a party who takes the stand on his own behalf cannot then claim the privilege against self-incrimination on cross-examination on matters reasonably related to the subject matter of his direct examination. Accordingly, the court struck Huckaby's testimony on direct

1. Huckaby did not offer any evidence to show how his testimony as to the whereabouts of the ledger would "support a conviction under a federal criminal statute" or "furnish a link in the chain of evidence needed to prosecute the claimant for a federal crime." *Hoffman v. United States*, 341 U.S. 479, 486 (1951). However, because of our disposition of this appeal on grounds other than the fifth amendment, we need not decide whether the privilege was validly invoked. *See also infra* note 7.

that after January or February 1983 he no longer had possession, custody, or control of the ledger, and found that Huckaby failed to carry his burden of production of credible evidence on the issue. Huckaby filed a timely notice of appeal.[2]

II.

[1] The Internal Revenue Code authorizes the IRS to examine records, to issue summonses, and to take testimony for the purpose of "determining the liability of any person for any internal revenue tax." 26 U.S.C. § 7602 (a); *see United States v. Euge,* 444 U.S. 707, 710-11 (1980). In order for a district court to enforce an IRS summons, the government must produce evidence showing that (1) the summons was issued for a proper purpose; (2) the information sought is relevant to that purpose: (3) the information sought is not already within the IRS Commissioner's possession; and (4) all administrative steps required by the Internal Revenue Code have been followed. *United States v. Powell,* 379 U.S. 48, 57-58 (1964); *United States v. Texas Heart Institute,* 755 F.2d 469, 474 (5th Cir. 1985). Huckaby concedes that the government need not introduce evidence that he actually possesses the requested documents as a part of this initial showing.

[2] Once the *Powell* factors have been met, "the burden shifts to the parties resisting the summons [1] to demonstrate that the IRS has failed to meet its *Powell* burden [citations omitted], [2] to assert and prove that enforcement would represent an abuse of the court's process [citations omitted]," *Texas Heart Institute,* 755

2. The order enforcing the IRS summons is appealable as a final order. *Reisman v. Caplin,* 375 U.S. 440, 449 (1964).

F.2d at 474, or [3] to show any other "appropriate ground" on which the summons should not be enforced. *Powell,* 379 U.S. at 58. A lack of possession and control of summoned documents is a "valid defense" to an IRS application for an enforcement order. *United States v. Barth,* 745 F.2d 184, 187 (2d Cir. 1984) (citing *United States v. Rylander,* 460 U.S. 752, 757 (1983)), *cert. denied,* 105 S. Ct. 1356 (1985)). However, as with any defense in an IRS summons enforcement proceeding, the party resisting enforcement bears the burden of producing credible evidence that he does not possess or control the documents sought. *Barth,* 745 F.2d at 188 (nonpossession must be "properly established"); *see Texas Heart Institute,* 755 F.2d at 475 (respondent must "prove" affirmative defenses); *United States v. Hankins,* 565 F.2d 1344, 1351-52 (5th Cir.) (government satisfied *Powell* factors, no evidence introduced by respondent "that he was unable to produce the records" when respondent would testify only on condition that he not be cross-examined, therefore summons properly enforced), *rehearing denied,* 581 F.2d 431 (5th Cir. 1978), *cert. denied,* 440 U.S. 909 (1979); *United States v. Toyota Motor Corp.,* 569 F. Supp. 1158, 1161 (C.D. Calif. 1983) (petition to enforce summons denied when respondent by affidavit and testimony produced evidence showing that documents were discarded in normal course of business and government introduced no contrary evidence).[3] The issue pre-

3. Huckaby disagrees with the proposition that he bears a burden of producing credible evidence of nonpossession citing *United States v. Patterson,* 219 F.2d 659 (2d Cir. 1955), and *United States v. Silvio,* 333 F.Supp. 264 (W.D. Mo. 1971). Instead, he claims that once he made a threshold, although uncross-examined, showing of a lack of possession of the documents, then the burden of producing evidence concerning the whereabouts of the ledger should have shifted to the IRS. *Patterson,* however, simply stands for the rule that in a criminal contempt proceeding, the government may not place the

sented by this appeal is whether Huckaby may successfully resist enforcement of the summons with a defense of lack of possession of the accounts receivable ledger by simply stating that he did not possess it, then asserting his fifth amendment privilege in response to cross-examination on that statement.[4]

## III.

[3] Having concluded that Huckaby had a burden of producing credible evidence of nonpossession in the summons enforcement hearing, it is clear that under the reasoning of *Rylander,* 460 U.S. at 752, Huckaby has not met his burden. In *Rylander,* the respondent ignored an IRS summons, and failed to comply with an order to show cause why the summons should not be enforced by the district court. The court enforced the summons, and respondent appeared before an IRS agent as ordered.

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burden of proof on an essential element of the offense on the defendant. 219 F.2d at 661. *Silvio* decided, without citation to authority, that once the respondent (1) made a showing, by affidavit, that he had produced all the records which were or which ever had been in his possession from the date of the issuance of the summons until the date of administrative hearings in the case, and (2) testified in the administrative proceeding as to his lack of knowledge of the whereabouts of summoned records, 333 F.Supp. at 266, then absent a claim that the respondent participated in a scheme to defeat the summons or that the affidavits or testimony were false the government has the burden to "demonstrate" continued possession. *Id.* at 267. *See United States v. Hankins,* 565 F.2d 1344, 1352 (5th Cir. 1978), *cert. denied,* 440 U.S. 909 (1979). Whatever the validity of *Silvio,* it is clear that Huckaby can find no solace in it because he did not testify under oath in any forum that he had no knowledge of the whereabouts of the ledger. Respondent in *Silvio* introduced credible, *i.e.,* cross-examined evidence of nonpossession; Huckaby has not. *See also Toyota Motor Corp.,* 569 F.Supp. at 1161.

4. In the District Court, Huckaby unsuccessfully argued that the *Powell* factors were not met by the government. He has not pursued those claims on appeal, and we consider those issues abandoned.

However, he did not produce the records requested, and the district court ordered a hearing to determine whether respondent should be held in civil contempt. At the hearing, the respondent testified as follows:

EXAMINATION BY THE COURT

Q: Mr. Rylander, you have filed an affidavit in which you say that you do not have the records that are the subject of the action; is that true, sir?

A: That is correct your Honor.

Q: Where are the records?

A: I respectfully decline to answer on the advice of counsel and assert my Fifth Amendment.

460 U.S. at 763 (Marshall, J., dissenting).

[4] Respondent in *Rylander* had the burden of producing evidence on his defense of a lack of possession. However, since Rylander "declined to be cross-examined with respect to his assertions of nonpossession, the District Court was entirely justified in concluding, as it did, that Rylander 'fail[ed] to introduce any evidence at the contempt trial.' This was a time for testimony, and Rylander's *ex parte* affidavit and uncross-examined testimony were properly disregarded by the District Court." *Id.* at 755. The Court rejected Rylander's claim that the fifth amendment allowed him both to avoid cross-examination and to meet his burden of production:

> [W]hile the assertion of the Fifth Amendment privilege against compulsory self-incrimination may be a valid ground upon which a witness such as Rylander declines to answer questions, it has never been thought to be in itself a substitute for evidence

> that would assist in meeting a burden of production. We think the view of the Court of Appeals would convert the privilege from the shield against compulsory self-incrimination which it was intended to be into a sword whereby a claimant asserting the privilege would be freed from advancing proof in support of a burden which would otherwise have been his.

*Id.* The Court added that "the claim of privilege is not a substitute for relevant evidence." *Id.* at 761. *See also United States v. Meeks,* 719 F.2d 809, 812 (5th Cir. 1983) ("privilege against self-incrimination cannot substitute for evidence").

The reasoning of *Rylander,* although not its holding, directly controls Huckaby's arguments on this appeal. Huckaby had a burden of producing relevant and reliable evidence that he was not in possession or control of the summoned documents in order to sustain his affirmative defense to enforcement of the summons.[5] He did not do so. His testimony is nearly indistinguishable from the testimony that the Supreme Court found lacking in *Rylander.*

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5. *Rylander* did not decide this point. In fact, the Court's conclusion that Rylander had a burden of production in the contempt proceeding was based in part on the presumption of continuing possession following entry of the enforcement order. *Maggio v. Zeitz,* 333 U.S. 56, 64-67 (1948). Rylander could not overcome that presumption without introducing credible evidence in the contempt proceeding. 460 U.S. at 760-61 & n.3. No such presumption applies in this summons enforcement proceeding, and "*Rylander* leaves open the question of whether resort to the privilege against self-incrimination in a subpoena enforcement proceeding will shift the burden of proving availability to the government," *Project, White-Collar Crime: Survey of Law—1983 Update,* 21 Am. Crim. L. Rev. 179, 183 (1983). However, to place the burden of proving availability on the government after the respondent simply states that documents are unavailable and refuses further testimony would be inconsistent with settled law that requires the respondent to bear the burden of producing credible evidence on affirmative defenses in summons enforcement actions. *See supra* note 3 and accompanying text.

Huckaby attempts to distinguish *Rylander* by noting that *Rylander* was a civil contempt proceeding in which respondent had a "burden of proof." Huckaby, on the other hand, "was not testifying under any burden of proof from any 'burden of production' arising from a prior court order enforcing this summons." Brief on Behalf of Respondent-Appellant at 24.

Huckaby is correct that *Rylander* was a civil contempt proceeding and this is a summons enforcement action. However, that difference is not dispositive. Rylander and Huckaby each had a burden of production, although for different reasons. Respondent in *Rylander* was obliged to introduce evidence that he did not possess requested documents at the time of his testimony in order to avoid a judgment of civil contempt because he was presumed to still be in possession of the documents following the enforcement order. *See supra* note 5. He did not meet this burden by simply stating that he did not possess the documents and refusing to answer all other questions put to him. In this case, once the government satisfied the *Powell* factors, Huckaby was obliged to introduce credible evidence that he did not possess the requested document in order to avoid enforcement of the summons, because he carried the burden of production on his affirmative defense of nonpossession. He did not meet this burden by simply stating that he did not possess the document and refusing to answer all other questions put to him. If Huckaby wished to avoid enforcement of the summons on the ground that he did not possess the document, then the enforcement hearing "was a time for testimony," *Rylander,* 460 U.S. at 758.

Huckaby disagrees, relying in large part on *Curcio v. United States,* 354 U.S. 118 (1957), which concerned

waiver of the fifth amendment privilege by a corporate custodian who was the subject of a subpoena *ad testificandum*. *Id.* at 121. The Court held, in the context of a criminal contempt proceeding, that "*forcing* the custodian to testify orally as to the whereabouts of nonproduced records requires him to disclose the contents of his own mind. . . . That is contrary to the spirit and letter of the Fifth Amendment." *Id.* at 128 (emphasis added). Huckaby's reliance on *Curcio* is misplaced for several reasons.

First, and most important, the District Court did not "force" Huckaby to testify as to the whereabouts of the ledger on cross-examination or risk the court's contempt power. Rather, the court simply enforced the summons on the basis of Huckaby's failure to introduce evidence on an issue on which he had the burden of production. As the Court noted in *Rylander,* "[w]e have squarely rejected the notion . . . that a possible failure of proof on an issue where the defendant had the burden of proof is a form of 'compulsion' which requires that the burden be shifted from the defendant's shoulders to that of the government." 460 U.S. at 758. *Compare United States v. Edgerton,* 734 F.2d 913, 919-21 (2d Cir. 1984) (civil contempt order entered for taxpayer's refusal to answer questions posed by the court as to whereabouts of tax records vacated under *Curcio;* responses were "forced").[6]

Moreover, this case concerns only production of corporate documents, like *Rylander,* and not oral testimony,

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6. *Curcio* "contains dicta to the effect that mere authentication testimony may be compelled." *In re Grand Jury Matter (Brown),* 768 F.2d at 527 (citing *Curcio,* 354 U.S. at 125). The Third Circuit, en banc, has determined the dicta to be inconsistent with *Curcio's* holding, and declined to follow the dicta in a recent civil contempt proceeding. 768 F.2d at 527.

like *Curcio.* Although the summons required Huckaby both to produce books and records and to testify about them, the order enforcing the summons entered by the District Court only requires production of documents, and not testimony. Record Vol. 1 at 54. Therefore, this case, like *Rylander,* is "exactly the converse" of *Curcio.* 460 U.S. at 760.

[5] Finally, waiver was the focus of *Curcio,* but we do not address that topic. The question of whether Huckaby waived his fifth amendment right by taking the stand at the summons enforcement proceeding need not be decided,[7] because our affirmance of the enforcement of the summons is based not on waiver, but simply on a failure

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7. We need not decide to what extent the fifth amendment privilege is available to Huckaby in light of the fact that the summons is directed to the corporation, and normally "a corporate representative or agent [such as Huckaby] cannot claim a fifth amendment privilege against producing corporate documents, regardless of whether they contain information incriminating to him or were written by him, and regardless of whether the corporation is large or small." *In re Two Grand Jury Subpoenae Duces Tecum,* 769 F.2d 52, 56 (2d Cir. 1985). Moreover, we do not address to what extent the fifth amendment privilege is available in summons enforcement proceedings in which the defense of nonpossession is not raised. *Cf. Fisher v. United States,* 425 U.S. 391, 410 (1975) (affirming general rule that corporate documents not privileged, but holding act of producing document by corporate custodian may be privileged if act of production itself would be incriminating); *Rogers Transportation, Inc. v. Stern,* 763 F.2d 165, 166 (3d Cir. 1984) (en banc). Further, we need not decide whether to equate majority stockholders in closely held corporations with the sole proprietor in *United States v. Doe,* 104 S. Ct. 1237 (1984). *Compare In re Grand Jury Subpoena Dated January 28, 1985,* 769 F.2d 52 (2d Cir. 1985) (majority stockholder in closely held corporation may not use fifth amendment privilege in response to grand jury subpoena to produce corporate records), *with In re Grand Jury Matter (Brown),* 768 F.2d 525 (3d Cir. 1985) (en banc) (sole stockholder of corporation may exercise fifth amendment privilege in response to grand jury subpoena requiring authentication of corporate records).

to meet a burden of production. *Rylander,* 460 U.S. at 761 n.2.[8]

Regardless of the application of the reasoning of *Rylander,* Huckaby argues that even if his testimony is struck, then the testimony of an employee, Carol Pitre, satisfied his burden of introducing evidence on the lack of possession defense. However, Pitre did not begin work at the company until 1982, and there is no indication that she could testify as to the existence or whereabouts of records from 1980 and 1981. Record Vol. 2 at 45-46. Moreover, it seems clear from a review of the testimony of Pitre and other witnesses that, as counsel for Huckaby stated, "Ms. Pitre was testifying about a different book that was thrown away monthly," *Id.* at 49, not the book summoned. Pitre's testimony does not satisfy Huckaby's burden.

## IV.

Huckaby did not meet his burden of producing credible evidence that he did not possess the requested records. Therefore, the District Court's finding "that records existed and were in Mr. Huckaby's possession, custody or control as President of the Corporation at the time he was served with the summons" is not clearly erroneous, Fed. R. Civ. P. 52(a), and the summons was properly enforced. The judgment of the District Court is AFFIRMED.

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8. In *Rylander,* the Court did not, as Huckaby claims, hold that a witness who testified at a contempt hearing waived his fifth amendment right merely by taking the stand. Rather, it noted expressly that it did not need to decide the issue. *Id.*

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

CIVIL NO. W-84-CA-113

UNITED STATES OF AMERICA, and
EDMOND J. MARTIN, REVENUE OFFICER,
INTERNAL REVENUE SERVICE,
Petitioners

v.

S. DON HUCKABY,
Respondent

(Filed August 13, 1984)

ORDER

This is a summons enforcement case. A summons was issued on January 26, 1984, to Respondent as President of Good Times Liquor, Inc. (hereinafter the "corporation") to appear and give testimony and to produce for examination the "red" accounts receivable subsidiary ledger for the years 1980-1982 (the "records") of the corporation in regards to the examination of the income tax liability of Mr. Enzo "Jimmy" Pelligrino for the years 1980-1982. Mr. Huckaby did not appear on the date summonsed. Petitioners then filed this petition for enforcement of summons.

The petitioners have filed two declarations and an affidavit in support of enforcement of the summons. On July 24, 1984, a hearing was held in Waco, Texas, for the Respondent to show cause why the Respondent should not be directed to produce the records summonsed.

The Court finds that the affidavit and declarations filed by the Petitioners and the testimony of Special Agent Edmond J. Martin at the hearing established that (1) the investigation by the Internal Revenue Service was being conducted for a legitimate purpose, (2) that the summonsed records are relevant to that purpose, (3) the records are not already in the Government's possession, (4) the administrative steps required by the Internal Revenue Code have been followed, and (5) a Department of Justice referral was not in effect for either Mr. Huckaby or Mr. Pelligrino at the time the summons was served. See, Section 7602 of the Internal Revenue Code of 1954 (26 U.S.C.); *United States v. Powell,* 379 U.S. 48, 57-58 (1964).

The Court furthermore finds that Respondent has not shown the Court why the enforcement of the summons would be an abuse of process or otherwise be improper. The Court specifically finds that records existed and were in Mr. Huckaby's possession, custody or control as President of the Corporation at the time he was served with the summons. At the hearing, Mr. Huckaby testified on direct examination that after January or February of 1983 he no longer had possession, custody or control over the records. Petitioners tried to cross-examine Mr. Huckaby concerning possession, custody and control, and Mr. Huckaby refused to answer on grounds that his testimony might tend to incriminate him. A party who takes the stand on his own behalf cannot then claim the privilege against cross-examination on matters reasonably related to the subject matter of his direct examination. See, *McGautha v. California,* 402 U.S. 183 (1971). The Court thereby strikes Mr. Huckaby's testimony that after January or February 1983 he no longer had possession,

custody or control. *United States v. Rylander,* ____U.S. ____, 103 S. Ct. 1548, 75 L.Ed. 521 (1983), *United States v. Bauer,* 721 F.2d 647, 649-650 (8th Cir. 1983).

The Respondent alleged that the Internal Revenue Service had issued the summons in bad faith to assist a Texas Alcoholic Beverage Commission (TABC) investigation of Respondent. The basis for Respondent's allegation is that TABC contacted Special Agent Edmond Martin on various occasions concerning records in the Internal Revenue Service's possession, required to be kept at Good Times Liquor, Inc., for inspection by the TABC, and the Internal Revenue Service gave the TABC taxpayer information. The Court finds that Respondent referred TABC to Special Agent Martin and any disclosures by the Internal Revenue Service to the TABC were with the authorization of Respondent, and furthermore, that no evidence exists that the summons was issued to assist the TABC.

The Court rejects Respondent's allegations that Section 7602(b) is unconstitutional in that it allows the Internal Revenue Service to issue a summons solely to investigate criminal offenses under the Internal Revenue Code, there are no requirements that probable cause exists before issuance of the summons nor does an independent magistrate authorize its issuance. The Court finds that the summons was issued in a joint criminal and civil investigation of Mr. Pelligrino. Finally, even if the summons had been issued solely to aid a criminal investigation, there is no constitutional violation: the summons must be submitted to the Court for enforcement and the mere issuance of a summons does not violate Mr. Huckaby's due process rights. *United States v. Sun First National Bank of*

*Orlando,* 510 F.2d 1107, 1110 (5th Cir. 1975). The Court therefore,

ORDERS that the summons be enforced as to the production of the Good Times Liquor, Inc.'s "red" accounts receivable subsidiary ledger for the years 1980-1982. Mr. Huckaby is to appear and produce the "red" accounts receivable subsidiary ledger for the years 1980-1982 to the Internal Revenue Service on September 5, 1984 at Room 104, Federal Building, 101 South Main, Temple, Texas at 10:30 a.m.

In the event that the Respondent fails to produce the "red" accounts receivable subsidiary ledger for years 1980-1982 to the Internal Revenue Service on or before September 5, 1984, it is further

ORDERED that the said Respondent appear before the United States District Court for the Western District of Texas, Waco Division, on the 8th day of October, 1984 at 12:00 noon and show cause why he should not be held in contempt. It is further

ORDERED that this Order may be served on Respondent by an Officer or Agent of the Internal Revenue Service.

August 10, 1984

/s/ LUCIUS D. BUNTON
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 84-1774

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D.C. Docket No. CA-W-84-113

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UNITED STATES OF AMERICA, ET AL.,
Plaintiffs-Appellees,

v.

S. DON HUCKABY,
Defendant-Appellant.

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Appeal from the United States District Court
for the Western District of Texas

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Before RANDALL, DAVIS, and HILL, Circuit Judge.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiffs-appellees the costs on appeal, to be taxed by the Clerk of this Court.

November 18, 1985

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 84-1774

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UNITED STATES OF AMERICA, ET AL.,
Plaintiffs-Appellees,

v.

S. DON HUCKABY,
Defendant-Appellant.

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Appeal from the United States District Court
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ON SUGGESTION FOR REHEARING EN BANC
(Opinion 11/18/85, 5 Cir., 198__, ____F.2d____)
( December 31, 1985 )

Before RANDALL, DAVIS, and HILL, Circuit Judges.

PER CURIAM:

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

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ENTERED FOR THE COURT:

/s/ CAROLYN DINEEN RANDALL
United States Circuit Judge

## U.S. CONSTITUTION

### *Amendment V*

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

## INTERNAL REVENUE CODE

### *I.R.C. § 7210. Failure to obey summons*

Any person who, being duly summoned to appear to testify, or to appear and produce books, accounts, records, memoranda, or other papers, as required under sections 6420(e)(2), 6421(f)(2), 6427(i)(2), 7602, 7603, and 7604(b), neglects to appear or to produce such books, accounts, records, memoranda, or other papers, shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than 1 year, or both, together with costs of prosecution.

### *I.R.C. § 7402*

*(b) To enforce summons.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, or other data, the district court of the United States for the district in which such person resides or may be found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, or other data.

*I.R.C. § 7602. Examination of books and witnesses*

*(a) Authority to summon, etc.*—For the purpose of ascertaining the correctness of any return, making a return where none has been made, determining the liability of any person for any internal revenue tax or the liability at law or in equity of any transferee or fiduciary of any person in respect of any internal revenue tax, or collecting any such liability, the Secretary is authorized—

(1) To examine any books, papers, records, or other data which may be relevant or material to such inquiry;

(2) To summon the person liable for tax or required to perform the act, or any officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for tax or required to perform the act, or any other person the Secretary may deem proper, to appear before the Secretary at a time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony, under oath, as may be relevant or material to such inquiry; and

(3) To take such testimony of the person concerned, under oath, as may be relevant or material to such inquiry.

*I.R.C. § 7604. Enforcement of summons*

*(a) Jurisdiction of district court.*—If any person is summoned under the internal revenue laws to appear, to testify, or to produce books, papers, records, or other data, the United States district court for the district in which such person resides or is found shall have jurisdiction by appropriate process to compel such attendance, testimony, or production of books, papers, records, or other data.

*(b) Enforcement.*—Whenever any person summoned under section 6420(e)(2), 6421(f)(2), 6427(i)(2), or 7602 neglects or refuses to obey such summons, or to produce books, papers, records, or other data, or to give testimony, as required, the Secretary may apply to the judge of the district court or to a United States commissioner for the district within which the person so summoned resides or is found for an attachment against him as for a contempt. It shall be the duty of the judge or commissioner to hear the application, and, if satisfactory proof is made, to issue an attachment, directed to some proper officer, for the arrest of such person, and upon his being brought before him to proceed to a hearing of the case; and upon such hearing the judge or the United States commissioner shall have power to make such order as he shall deem proper, not inconsistent with the law for the punishment of contempts, to enforce obedience to the requirements of the summons and to punish such person for his default or disobedience.